IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION, ET AL, *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

BRIEF FOR SOUTHERN RAILWAY COMPANY.

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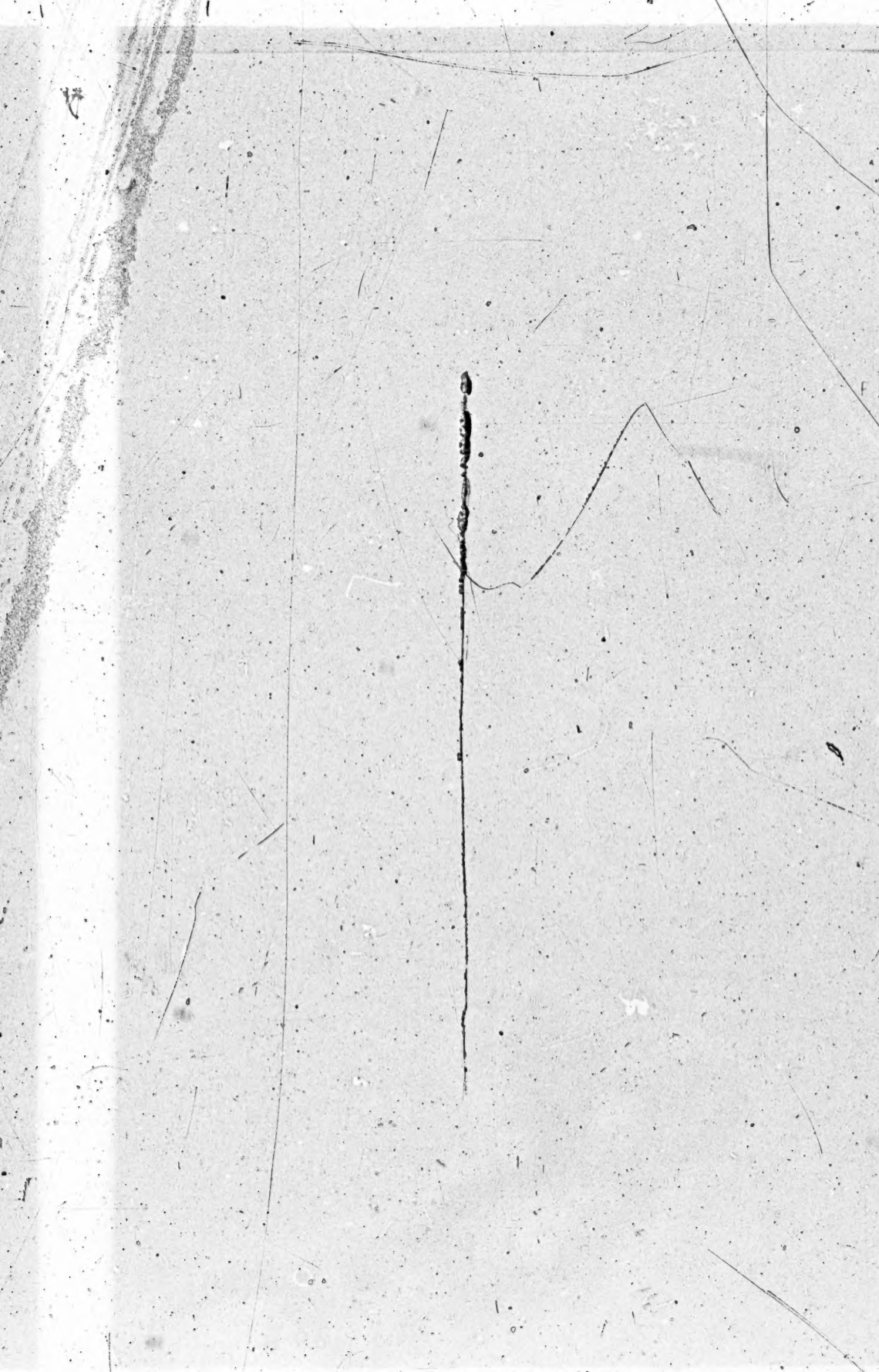

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CONSTITUTION AND STATUTES.

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OPINIONS BELOW.

The opinion of the specially constituted three-judge United States District Court, for the Middle District of Alabama, Northern Division thereof (No. 681-N), appears in the record at pages 45-71, and is reported 91 Fed. Supp. 980.

The report and order of the Alabama Public Service Commission which gave rise to the proceedings in the district court appear in the record at pages 27-39.

JURISDICTION.

This is a direct appeal authorized by Title 28 U. S. C., Section 1253.

Suit was brought in the district court under the provisions of the Act of June 25, 1948: 28 U. S. C., Sections 1331, 1332, 2281, and 2284.

STATUTES INVOLVED.

28 U. S. C., Sections 1253, 1331, 1332, 2281, 2283, and 2284. Alabama Code, 1940, Title 48, Sections 17, 79, 82, 84, 86, 87, 88, 89 and 106.[1] Constitution of the United States Amendment XIV, Section 1.

STATEMENT OF THE CASE.

September 13, 1948, Southern Railway Company, appellee, filed a petition (R. 8) with the Alabama Public Service Commission (Docket 11988) for authority to discontinue operation of its passenger trains Nos. 7 and 8 operated daily between Tuscumbia, Ala., and Chattanooga, Tenn., in so far as their operation took place within the State of Alabama, to-wit, 130 miles in each direction.[2]

The ground for this application was the disparity between the revenue and the cost of operation because of small public patronage due to motor car operation, public and private, over improved highways, showing the lack of public need for such rail service. The petition recited that for a twelve-month period the direct expenses of operating these trains exceeded the total revenues therefrom by $78,710.74 (R. 9).

The Alabama Commission did not set appellee's application for hearing until June 2, 1949; then of its own motion postponed the hearing date until August 4, 1949, and still later, until October 6, 1949, on which date the application was heard before three representatives of the Commission, none of the three commissioners sitting (R. 3).

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[1] Set out in full in Appendix A, pages 34-35, and Appendix B, pages 35-38. Appellee's brief in No. 146.

[2] The operation between the Alabama-Tennessee state line and Chattanooga, Tenn., a distance of about 15 miles, was authorized to be discontinued by the Tennessee Railroad and Utilities Commission, Docket No. R. 3085.

Under the state statute the Commission is required to render decision within ninety days after the completion of hearings, provided that it may issue an order stating its reason for inability to decide the case within ninety days, and thereupon extend the time for decision for another period not to exceed ninety days. Title 48, Alabama Code 1940, Section 77.

April 3, 1950, a year and nearly six months after the petition was filed, the Commission issued its report and entered its order thereon denying appellee's application to discontinue these trains (R. 27-39, Exhibit A to defendants' answer).

May 3, 1950, appellee, Southern Railway, filed its complaint (R. 1) in the United States district court pleading the application to discontinue, the denial thereof and charging thereby that the defendant Commission had denied appellee due process of law and confiscated and deprived it of its property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States (R. 7). Diverse citizenship and appropriate jurisdictional amount were alleged. The prayer was for a decree declaring the order of the Commission null and void, and for interlocutory and permanent injunctions against the Commission, its members, and the Attorney General, from proceeding against the railway, its officers, agents, or employees, to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of failure to continue operation of passenger trains Nos. 7 and 8, required by the order of defendant Commission of April 3, 1950. (R. 7, 8.)

Defendants filed their motions to stay (R. 21 and R. 39) and their answer (R. 24).

Designation of the three-judge court was filed on May 8, (R. 17) and on that date the court set the cause for trial May 22, 1950 (R. 18) on which date it was heard (R. 46).

July 20, 1950, the three-judge district court filed its opinion, findings of fact, and conclusions of law (R. 45-71), and on that date entered its final decree (R. 71-72).

September 18, 1950, the district court entered an order allowing appeal (R. 42).

November 27, 1950, this Court noted probable jurisdiction and transferred this case, No. 395, to the summary docket and assigned it for argument immediately following the argument in No. 146, which case it also transferred to the summary docket (R. 75).

ARGUMENT.

In their brief appellants argue four points: I. A federal court should decline to enjoin enforcement of the criminal laws of the State of Alabama. II. There was no jurisdiction in any federal court of equity, there being no irreparable damage because Southern Railway had an adequate remedy in the state courts. III. The three-judge federal district court had no jurisdiction of this cause. IV. The federal courts should abstain from exercising jurisdiction of matters properly decided by state courts. While stated as four points in the brief in this case, No. 395, the points are embraced within three points argued in No. 146, October Term, 1950, a companion case.

Having discussed the points argued in No. 146 in our brief in that case and, we submit, having shown them to be without merit and the supporting arguments to be unsound, we do not burden the Court with a repetition of our arguments in this brief. We therefore take the liberty of referring to our brief in No. 146, believing ourselves justified in doing that because No. 395 has been assigned for argument immediately following the argument in No. 146. Likewise we refer to the statutes, federal and state, set out in appendices to our brief in No. 146, rather than duplicate them in appendices to this brief.

We take the further liberty of saying that here we also rely on the strong opinion, findings of fact and conclusions of law filed by the three-judge district court in this cause, and conveniently appearing in the record at pages 45-71. Therein, Judge Lynne, speaking for the unanimous court,

overruled appellants' motions in clear and precise language, amply supported by authorities cited, and then in the findings dealt with the evidence in much detail. The conclusions of law found specifically: That should the railway continue to operate these trains it would suffer irreparable damage by spending sums grossly disproportionate to revenue in a situation where there is no public necessity or demand for such service; that if the railway fails to operate said trains it must be subjected to irreparable loss by incurring liability under sanctions imposed by Title 48, Code of Alabama, 1940, including Sections 110, 399, 400, and 405; that plaintiff will suffer such irreparable damage unless injunctive relief is granted against defendants and their successors in office from seeking to impose the sanctions provided by the Alabama statute, upon discontinuance of operation of these trains; and that the Commission's denial of permission to discontinue operation is unjust, unreasonable, and confiscatory, and deprives the railway of its property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

As we have said, Nos. 146 and 395 are companion cases. There are a few points of difference.

In both cases the same railway filed applications with the same state commission as required by the same state statute to discontinue operation of unprofitable passenger trains for which there was no public need. Both applications were denied, after long delay.

All four trains were discontinued on October 26, 1949, in compliance with an Interstate Commerce Commission order. Trains 7 and 8 (Case 395) were restored when the Interstate Commerce Commission's order was lifted effective November 21, 1949. Trains 11 and 16 (Case 146) were not restored, for while they were out of operation the railway filed a supplemental petition with the Commission for authority to not restore them.

This difference arose because the hearing had been held on Trains 7 and 8 on October 6, 1949. As the Commission

had waited thirteen months to hear the case, the railway expected a prompt decision. On the record made the railway anticipated an order authorizing discontinuance. In the case of Trains 11 and 16, fourteen months had elapsed, but no hearing date had even been announced. The losses on 11 and 16 were large and steadily increasing. This prompted the railway to file the supplemental petition on trains 11 and 16 and to advise the Commission that it was unwilling to restore the trains until it had been heard on its supplemental petition to not restore them. This course brought a hearing date in less than thirty days, and, after hearing, an order, even though a denial, was rendered in thirty days.

The entry of the final decree on February 13, 1950, by the three-judge court in No. 146 merged the temporary restraining order of December 6, 1949, against the Commission's order of December 5, entered on the citation it had served on the railway. Viewed as of the final decrees, the two cases are in substantially the same position.

The other point of difference between these cases is in the complaints.

In No. 146 the railway, while not challenging the constitutionality of the requirement of the Alabama statute (Section 106, Title 48 of the Code) that an application be made and authority received from the Commission before discontinuing passenger train operation, did allege[3] that no standards for the guidance of the Commission were prescribed, and the statute was therefore unconstitutional as an unlawful delegation of legislative power. This allegation was not pursued on argument nor passed on by the court below. It was not a factor in the case, and can be treated only as surplusage.

In the complaint in No. 395 we specifically disclaimed any purpose to have that point adjudicated (Paragraph IV of the complaint, R. 2) and it was not a factor therein.

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[3] Paragraph 4; R. 2, Case No. 146.

In both cases we stand squarely on the doctrine of *Oklahoma Natural Gas. Co.* v. *Russell*, 261 U. S. 290 (1923) that Section 2281 of Title 28 U. S. C. (then Section 266) encompasses orders of state commissions of the type involved in both these cases.

Appellants have attempted to make a distinction of those differences in the complaints and have asserted that we were in error in either instance. However, there is no such distinction in the cases and there is no distinction in Section 2281 between cases where a state statute is attacked as unconstitutional and those in which an administrative order enacted under a state statute is so attacked.

We submit in the case at bar (No. 395) that appellee was denied due process of law first by the Commission's dilatory tactics in setting the case and twice postponing it so that a period of thirteen months elapsed between the filing of the petition and the hearing date, and then to compound such dilatory action the Commission delayed until the very last day allowed by state law before rendering a decision—a lapse of a year and a half from the filing of petition to date of order denying petition. The railway might have filed its complaint treating nonaction as substantially a denial of its application. This Court has held that a party so situated is not required indefinitely to await a decision. We refer to *Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587 (1926), where, at pages 591-592, it was said:

> "* * * Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger

case for such relief than any of the cases with which this court dealt in."[4]

The unseemly delays in setting a hearing and then deciding this case become all the stronger as a denial of due process when it is recalled that in the application filed with the state commission the applicant railway's loss was shown as $78,710.74 for a twelve-month period, that is to say, the direct expenses exceeded the total gross revenues from operation by that amount. Numerous other items of cost could have been included in this computation but were omitted. Upon the hearing the loss from operation over the next twelve-month period was shown to the Commission to amount to $102,326.93. Finally the loss for the next five months was shown to be $53,692.56. The total for the three periods amounted to $234,730.23. Despite that heavy loss, continuing from day to day, and at an ever increasing ratio, the Commission unduly delayed setting the case, and then further delayed in deciding it.

In the district court the railway showed the daily average revenue from passengers in comparison with the daily cost for wages and fuel in the operation of these trains for the three periods just referred to. The computation was made on a per day basis to be fairly comparable in view of the fact that the trains had been out of operation a different number of days in the three periods. Likewise, in the district court the railway made this computation for the succeeding eight-month period. These comparisons show that the revenue from passengers fell short of the amount necessary to pay the wages, payroll taxes thereon, and fuel consumed by $57.10 per day during the first twelve-month period, $151.45 during the second twelve-month period, $168.24 during the third five-month period,

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[4] Omitted authorities

Okla. Gas Co. v. Russell, 261 U. S. 290, 293; *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 204; and *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 415.

and $195.43 per day during the fourth period of eight months.[5] Such delay in the face of such losses was a denial of due process, and such losses clearly show confiscation of the railway's property.

Upon compliance with the Commission's order of April 3, 1950, denying application to discontinue operation, appellee would necessarily incur, and continue to incur, tremendous losses from such operation. On the other hand, refusal to comply with said order would inevitably subject appellee to the statutory sanctions provided in the Alabama statutes for violation of the Public Service Commission's orders. There are several such penalty statutes and each day would constitute a violation, hence the amounts multiply rapidly with each passing day. No matter which horn of dilemma appellee should select, it would suffer irreparable damage.

That appellee was immediately confronted with irreparable damage was clear. Appellee had just had a painful experience with the Alabama Public Service Commission in connection with Trains 11 and 16 involved in Case No. 146 before this Court. There the Commission had needlessly delayed hearing the original and supplemental applications. It issued a pre-emptory order on a citation against the railway. It issued this order following the pretense of a hearing at which the railway appeared and offered its showing in the premises by witnesses then present, which evidence the Commission would not receive. In the pre-

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[5]

Operation of Trains 7 and 8	Average Daily Revenue From Passengers	Average Daily Wage and Fuel	Daily Excess Wages & Fuel Over Revenue
12 mos. ending 2/29/48	$180.94	$238.04	$ 57.10
12 mos. ending 2/28/49	124.74	276.19	151.45
5 mos. 3/1 to 7/31/49	97.02	265.26	168.24
8 mos. 8/1/49 to 3/31/50	83.11	278.57	195.46

Trains Discontinued Under I.C.C. Orders
Mar. 21, 1948 through May 2, 1948.....43 days
Oct. 26, 1949 through Nov. 20, 1949.....26 days
Jan. 9, 1950 through Mar. 11, 1950.....62 days
(Exhibits 4 and 5 to Complaint, R. 15, 16)

emptory order issued on the citation specific attention was therein called to the penalty statutes of the state. The railway was informed that it would not be heard on its original application until operation of the trains had been restored.

Even after a hearing date was set the Commission advised the railway that unless the trains were restored, it would be optional with the Commission whether the hearing would be held, or, as the Commission put it, until the railway had by restoring the trains purged itself of contempt. That the Commission was in a fighting mood clearly appeared from the foregoing facts and the further fact that the very day these trains were discontinued, in compliance with an order of the Interstate Commerce Commission, the Alabama Commission notified appellee that it expected such trains to be restored within twenty-four hours after the order of the Interstate Commerce Commission might be lifted. That all transpired immediately before the entry of the order of April 3, 1950, denying application to discontinue Trains 7 and 8 involved in Case No. 395. Experience is the best teacher. Appellee knew what to expect. Therefore, faced with immediate irreparable injury, appellee filed its complaint seeking injunctive relief.

In the case at bar, as in No. 146, there was no case pending in the state courts. The complaint was filed in the district court on May 5. On May 8, the three-judge court was designated and notice given the case would be tried on May 22. Following the trial on that date briefs were filed and the final decree was rendered on July 20. Appellants failed to institute proceedings for adjudication of the issues in the state courts, which they might have done, as contemplated by the last paragraph of Section 2284, Title 28 U. S. C. Here, as in Case No. 146, they waited until on appeal to this Court to raise purely procedural points, and in this case, as in No. 146, thereby in effect confessed the error the Alabama Commission made in denying application to discontinue these trains.

Appellants cite *Shipman* v. *Du Pre*, 339 U. S. 321 (1950) in support of their argument that federal courts should

abstain from exercising jurisdiction of matters properly decided by state courts. In the per curiam opinion in that case we find appellants' application for a declaratory judgment and injunction restraining the enforcement of certain sections of a South Carolina statute regulating fisheries and shrimping, on the ground that they violated the Constitution of the United States, was erroneously dismissed on the merits by a three-judge federal court, it not appearing that the statutory sections had been construed by the state courts. Citing *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-599, this Court vacated the judgment of the district court and remanded the cause with directions to retain jurisdiction to afford appellant opportunity to obtain by appropriate proceedings the construction by the state court.

In the case at bar there is no statute of the State of Alabama which it is necessary for the state courts to construe. Title 48, Section 106, simply requires that railways apply to the Alabama Public Service Commission and receive its authority for discontinuing train operation. Appellee railway has not challenged the constitutionality of that requirement. It filed application and, after long delay, the state commission denied the application. The state commission thereby applied the statute to appellee and under such application required appellee to run the trains in question. Appellee could comply and suffer the losses from such operation, or refuse to comply and suffer the penalties.

We submit *Shipman* v. *Du Pre* is of no avail to appellants here. Fruthermore, in that case this Court referred to its decision in *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-599. We refer to that case in order to better understand the decision in *Shipman* v. *Du Pre*. In *American Federation of Labor* v. *Watson* many sections of an elaborate state statute couched in the broadest terms were involved and there was much doubt over how the statute would be interpreted by the state authorities. Certainly there is no such complicated statutory scheme involved in

the Alabama statute with which we are here concerned. Also in *American Federation of Labor* v. *Watson* it appeared there was a state court proceeding in which the uncertainties in interpretation of the state law could be determined. There is no pending state action in Alabama in which the questions involved in the case at bar could be determined.

Having paused to comment on *Shipman* v. *Du Pre* because so recently decided by this Court, we think it all-important to call attention to *Toomer* v. *Witsell*, 334 U. S. 385 (1948). This case also involved the South Carolina statutes regulating shrimp fishing in the coastal waters. Toomer, et al., fishermen, citizens of Georgia, and a fish dealers' association, sued in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of the South Carolina statutes regulating shrimp fishing on the ground that they violated the Constitution of the United States.

The dealers' association was thrown out on the ground that it could show no irreparable injury from the enforcement of the statute. The individual fishermen failed to show that they had no adequate remedy at law in so far as their contentions with respect to the income tax statute was concerned since there was provision for payment of tax under protest and suit for recovery.

As to the fishermen's contention with respect to the regulatory statutes, however, it was held that they showed the imminence of irreparable injury for which there was no plain, adequate, and complete remedy at law, inasmuch as to remain at their occupation they were either required to pay out large sums of money for which no means of recovery were provided by South Carolina law or to assume the risk of heavy fines and long imprisonment for violation of the law.[6] If they withdrew from fishing until a test case

[6] Violation of the South Carolina statute brings suspension of the violator's license, as well as a maximum of $1,000 fine, or imprisonment for a year, or a combination of a $500 fine and a year's imprisonment. Page 391.

could be prosecuted they would have suffered a loss for which no compensation could be had (391-392). The court found that the doctrine of *American Federation of Labor* v. *Watson* did not apply (except as to a tax statute involved) since there was no need for interpretation of the statutes nor any other special circumstances requiring the federal court to stay action pending proceedings in the state court (392 footnote 15).

The decision of this Court in *Toomer* v. *Witsell* squarely supports appellee in the case at bar, No. 395, and in the companion case No. 146. We say that with the utmost confidence because should appellee railway comply with the state order and run the trains it immediately suffers a tremendous loss, and if it fails to run them it is immediately confronted with heavy penalties.

CONCLUSION.

The three-judge district court properly took jurisdiction, heard this cause, and entered its final decree therein. Appropriate averments were contained in the complaint, and are supported by the findings and conclusions of the district court. Upon the entry of the order of April 3, 1950, by the Alabama Commission denying appellee's application to discontinue the trains in question, the proceeding passed from the administrative to the judicial stage at which the railway had an election to sue in the federal or state court. Believing its remedy in the state court to be inadequate, decision was properly made to sue in the federal court; and upon invoking the jurisdiction of the federal court, quite properly, we submit, the cause necessarily came before a three-judge court. Appellants, having failed to avail of their opportunity afforded for adjudication of the issues in the state courts, as contemplated in the federal statutes, are now too late to be heard to complain that appellee sought federal jurisdiction rather than that of the state

courts. Their appeal here is without merit; their argument in support of it is unsound.

The decree of the district court should be affirmed.

Respectfully submitted,

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